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No. 89-960

In the Supreme Court of the United States

OCTOBER TERM, 1989

TIDELAND WELDING SERVICE, ET AL., PETITIONERS

v.

WALTER SAWYER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, on a petition for review of the Benefits Review Board's decision awarding compensation to two employees under the Longshore and Harbor Workers' Compensation Act, the court of appeals properly dismissed the petition on the ground that the Board lacked jurisdiction over petitioners' appeal from the decision of the administrative law judge.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	9
Appendix A	1a
Appendix B	3a

TABLE OF AUTHORITIES

Cases:

Griggs v. *Provident Consumer Discount Co.*, 459 U.S. 56 (1982)	7
ICC v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987)	7
Jones v. *Illinois Cent. Gulf R.R.*, 846 F.2d 1099 (7th Cir. 1988)	7, 8
Potomac Electric Power Co. v. *Director, OWCP*, 449 U.S. 268 (1980)	8
Tideland Welding Service v. *Director, OWCP*, 817 F.2d 1211 (5th Cir. 1987)	3
Udall v. *Tallman*, 380 U.S. 1 (1965)	9

Statutes, regulations, and rules:

Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*	2
33 U.S.C. 921(a)	3, 6
33 U.S.C. 921(b)	4
33 U.S.C. 921(c)	3
20 C.F.R.:	
Section 802.205A(a) (1987)	4, 6, 9
Section 802.205A(c) (1987)	8
Seciton 802.205A(d) (1987)	8
Section 802.205A(e) (1987)	5, 6, 7, 8
Section 802.206	4

Statutes, regulations and rules—Continued: Page

Fed. R. Civ. P.:
Rule 41 (a) 8, 9
Rule 59 7

Miscellaneous:
43 Fed. Reg. 42,144 (1978) 7

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TIDELAND WELDING SERVICE, ET AL., PETITIONERS

v.

WALTER SAWYER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B21) is reported at 881 F.2d 157. The opinions and orders of the Benefits Review Board (Pet. App. A1-A6; App., *infra*, 1a-2a, 3a-8a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 1989. A petition for rehearing was denied on September 18, 1989. Pet. App. C1-C2. The petition for a writ of certiorari was filed on December 14, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1980, petitioner Tideland Welding Service employed Walter Sawyer and Glynn Rhodes as welders at a shipyard in Morgan City, Louisiana. After leaving work on June 21, 1980, Sawyer and Rhodes were injured in a car accident. Sawyer and Rhodes later filed claims for compensation with the Director, Office of Workers' Compensation Programs, United States Department of Labor (Director), under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.* Sawyer and Rhodes sought compensation from petitioner Tideland Welding Service and its insurer, petitioner Liberty Mutual Insurance Company. After a hearing, an administrative law judge denied those claims in December 1982, concluding that "the place where the accident occurred did not constitute a maritime situs and that [Sawyer and Rhodes] were not in the course o[f] their employment at the time of the accident." Pet. App. B4.

In May 1984, the Benefits Review Board reversed that decision, concluding that Sawyer and Rhodes should be compensated. The Board therefore remanded the case to the ALJ "to determine the measure of compensation." Pet. App. B4. Petitioners filed an appeal from the Board's decision to the Fifth Circuit. The court of appeals dismissed that appeal on the ground that the Board's decision was not a final order subject to appellate review. *Id.* at B5-B6.

2. On November 25, 1986, the ALJ issued his decision on remand, awarding weekly benefits of $376 to Sawyer and $270 to Rhodes. Because petitioner Liberty Mutual had not paid either claimant any benefits since the date of the accident, the ALJ also

ordered Liberty Mutual to pay Sawyer $100,000 and Rhodes $30,000 by December 6, 1986. Pet. App. B5. On December 3, petitioners asked the Benefits Review Board to stay the ALJ's award. On December 5, Sawyer and Rhodes filed a motion for reconsideration before the ALJ. *Id.* at B5-B6, B8.

On December 8, 1986, the Board, construing petitioners' request for a stay as both a notice of appeal and a motion to stay, docketed the case for review and denied the stay.[1] One week later, Sawyer and Rhodes asked the ALJ for permission to withdraw their previously filed reconsideration motion. On January 6, 1987, while that withdrawal request was pending before the ALJ, Sawyer and Rhodes also filed an appeal from the ALJ's decision to the Benefits Review Board. And on January 13, 1987, the ALJ granted the request to withdraw the reconsideration motion. Pet. App. B6-B7.

3. a. In April 1987, the Benefits Review Board dismissed the appeals filed by Sawyer and Rhodes. Pet. App. A1-A6. The Board concluded that those appeals were filed outside the 30-day deadline set forth in 33 U.S.C. 921(a).[2] "Since claimants withdrew their

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[1] Petitioners had also filed a motion for an emergency stay in the court of appeals, together with a petition for review of the ALJ's decision. The court of appeals initially granted a stay. On June 1, 1987, the court of appeals dissolved that stay and dismissed petitioners' appeal for lack of jurisdiction under 33 U.S.C. 921(c). Pet. App. B6-B7; *Tideland Welding Service* v. *Director, OWCP*, 817 F.2d 1211 (5th Cir.).

[2] Section 921(a) provides:

> A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 919 of this title, and, unless proceedings for the suspension or setting aside of such order are instituted

motion [for reconsideration]," the Board concluded that the motion was "without effect," and could not trigger the tolling provision of 20 C.F.R. 802.205A (a) (1987). Pet. App. A4-A5.[3] Alternatively, the Board concluded that even if the motion for reconsideration was effective, the appeals were "untimely because [they were] filed prior to the administrative law judge's Order on the Motions." *Id.* at A5.[4]

b. In March 1988, the Board considered petitioners' appeal and affirmed the ALJ's decision on the merits. App., *infra*, 3a-8a. The Board reaffirmed its earlier decision, concluding that "the claimants were injured within the scope and course of their employment pursuant to the 'trip payment exception' to the 'coming and going rule,' " and that "claimants were injured on a covered situs." App., *infra*, 5a. The Board also rejected petitioners' contention that they were "entitled, under the Constitution, to have an Article III court review the Board's Order prior to paying claimants the compensation awarded by

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as provided in subsection (b) of this section, shall become final at the expiration of the thirtieth day thereafter.

Section 921(b) provides for review of compensation orders before the Benefits Review Board. 33 U.S.C. 921(b).

[3] 20 C.F.R. 802.205A(a) (1987) provided:

A timely motion for reconsideration of a decision or order of an administrative law judge or deputy commissioner shall suspend the running of the time for filing a notice of appeal.

As the court of appeals pointed out, see Pet. App. B11 n.2, the pertinent regulations have since been amended in a manner not material to this case. (They have also been redesignated as 20 C.F.R. 802.206.)

[4] In December 1987, the Board denied a motion for reconsideration filed by the Director. App., *infra*, 1a-2a.

the administrative law judge." App., *infra*, 6a. As the Board stated:

> [A]lthough it is clear that adjudication of workers' compensation claims under the Act involves "private rights," it is equally clear that Article III of the Constitution does not require Article III judges to perform every stage of adjudication where "private rights" are at stake.

App., *infra*, 8a.

c. Petitioners then sought review of the Board's decision in the court of appeals.

4. In August 1989, the court of appeals dismissed the petition for review and vacated the Board's decision, holding that because the Board lacked jurisdiction to consider petitioners' appeal from the ALJ's decision, the court lacked jurisdiction to review. Pet. App. B1-B21. The court first concluded that any appeal of the ALJ's decision filed while a motion for reconsideration was pending was subject to dismissal under the regulations even if the motion was later withdrawn. *Id.* at B12-B16.[5] The court then noted that, under the governing regulation, 20 C.F.R. 802.205A(e) (1987), "[f]ollowing final action by the administrative law judge or deputy commissioner [dismissing or granting the motion for reconsideration], a new notice of appeal shall be filed with the Clerk of the Board by any party who wishes to appeal." Pet. App. B16-B17 (brackets in original). Here, the court continued, petitioners "failed to file a new notice of appeal after the ALJ ruled on the

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[5] The court of appeals thus expressly disagreed with the Board's alternative ground for dismissing the claimants' appeal—that a perfected motion for reconsideration that is later withdrawn fails to toll the period for filing a notice of appeal. Pet. App. B14.

motion to withdraw the motion for reconsideration." *Id.* at B18. Since the court found no distinction in this context between a motion that has been withdrawn and a motion that has been disposed of on the merits, *id.* at B17, it held that the "Board deviated from [that] regulation[] when it found [petitioners'] notice of appeal timely," *id.* at B20-B21. Accordingly, the court vacated the Board's decision and dismissed the case. *Id.* at B21.

ARGUMENT

1. Petitioners contend (Pet. 14-23) that the court of appeals misconstrued the Board's regulations in holding that their failure to file a notice of appeal, after the ALJ had granted the claimants' request to withdraw their reconsideration motion, precluded review of the ALJ's compensation decision. Under those regulations, which implement the statutory 30-day deadline for review of compensation orders (see 33 U.S.C. 921(a)), "[a] timely motion for reconsideration of a decision or order of an administrative law judge * * * shall suspend the running of the time for filing a notice of appeal." 20 C.F.R. 802.205A(a) (1987). Those regulations further provide that "[i]f a timely motion for reconsideration * * * is filed, any appeal to the Board, whether filed prior to or subsequent to the filing of the timely motion for reconsideration, shall be dismissed as premature." 20 C.F.R. 802.205A(e) (1987). And the regulations expressly state that "[f]ollowing final action by the administrative law judge * * * [on a timely motion for reconsideration], a new notice of appeal shall be filed * * * by any party who wishes to appeal." *Ibid.*

As the Board explained over a decade ago, that procedural scheme "provides that a timely motion to reconsider renders an appeal premature and subject to dismissal. * * * [The] appeal time will begin anew upon action by the administrative law judge on a request for reconsideration and the filing of a new notice of appeal." 43 Fed. Reg. 42,144 (1978). In other words, like a premature motion to alter or amend a judgment under Fed. R. Civ. P. 59, a previously filed notice of appeal to the Board, in these circumstances, "simply self destructs." *Griggs* v. *Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982) (per curiam) (internal quotation marks omitted).

Here, petitioners filed their Board-construed "notice of appeal" two days before the claimants filed their motion for reconsideration before the ALJ. Under the express terms of 20 C.F.R. 805.205A(e) (1987), this attempt to invoke the Board's jurisdiction must fail since the regulation provides that "[i]f a timely motion for reconsideration * * * is filed, *any appeal to the Board, whether filed prior to or subsequent to the filing of the timely motion for reconsideration, shall be dismissed as premature.*" 20 C.F.R. 802.205A(e) (1987) (emphasis added). In these circumstances, the regulation obligated the Board to dismiss the appeal—an oversight properly corrected by the court of appeals—where, as here, petitioners did not file a new notice of appeal "[f]ollowing final action by the administrative law judge." *Ibid.* See *Jones* v. *Illinois Cent. Gulf R.R.*, 846 F.2d 1099, 1102 (7th Cir. 1988); cf. *ICC* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270, 284-285 (1987).[6]

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[6] Petitioners contend that they were not required to file a new notice of appeal because the ALJ's final decision—grant-

2. Petitioners also contend (Pet. 14, 24-26) that the court of appeals erred in failing to defer to the Board's construction of its regulations. But that contention rests on a false premise since the court of appeals found that the Board did not even identify "the grounds on which the Board found [petitioners'] notice of appeal to be timely." Pet. App. B9-B10. In any event, the court "recognize[d] that the rules and regulations of the Board deserve special deference," *id.* at B18 (citing *Jones* v. *Illinois Cent. Gulf R.R.*, *supra*), but also correctly concluded that such deference would not be appropriate where the Board "deviate[d] from its own regulations," Pet. App. B18; cf. *Potomac Electric Power Co.* v. *Director, OWCP*, 449 U.S. 268, 278 n.18 (1980). As explained above, the Board's implicit conclusion that petitioners had filed a timely notice of appeal cannot be squared with the plain terms of 20 C.F.R. 802.205A(e) (1987).[7] Accordingly, the court of appeals properly

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ing the claimants' request to withdraw the reconsideration motion—does not fall within the terms of 20 C.F.R. 802.205A (c) and (d) (1987). To be sure, those provisions speak of an ALJ's decision either to grant or deny a motion for reconsideration. But as the court of appeals correctly observed (Pet. App. B17-B18), a decision to grant a party's request to withdraw a reconsideration motion is the functional equivalent of the sort of final administrative action contemplated by Section 802.205A(c) and (d).

[7] Petitioners also attempt (Pet. 22) to analogize the Board's treatment of the claimants' withdrawal motion to a motion for voluntary dismissal under Fed. R. Civ. P. 41(a). But that analogy misses the mark. The question whether the running of a statute of limitations is suspended by the pendency of a civil complaint that has been voluntarily dismissed is in no way analogous to the question whether a notice of appeal can be filed during the pendency of a motion for reconsideration that is later withdrawn. Underscoring the difference,

refused to defer to the Board's unexplained exercise of jurisdiction over petitioners' challenge to the compensation award. See *Udall* v. *Tallman*, 380 U.S. 1, 4, 16-17 (1965).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1990

Rule 41(a) provides that, in certain circumstances, "an action may be dismissed by the plaintiff without order of court." Fed. R. Civ. P. 41(a). By contrast, a claimant's request to withdraw a reconsideration motion pending before an ALJ is not self-executing. To the contrary, since under the Board's regulations, the filing of a reconsideration motion effectively suspends the finality of the ALJ's decision, see 20 C.F.R. 802.205A(a) (1987), the ALJ is obliged to dispose of that motion in order for the review process to proceed.

APPENDIX A

BENEFITS REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR

BRB Nos. 86-3048 and 86-3048A

Case No. 81-LHCA-2135

OWCP No. 7-71798

WALTER SAWYER, CLAIMANT-RESPONDENT,
CROSS-PETITIONER

v.

TIDELAND WELDING SERVICE AND
LIBERTY MUTUAL INSURANCE COMPANY,
EMPLOYER/CARRIER-PETITIONERS,
CROSS-RESPONDENTS

BRB Nos. 86-3049 and 86-3049A

Case No. 81-LHCA-2136

OWCP No. 7-72799

GLYNN RHODES, CLAIMANT-RESPONDENT,
CROSS-PETITIONER

v.

TIDELAND WELDING SERVICE AND
LIBERTY MUTUAL INSURANCE COMPANY,
EMPLOYER/CARRIER-PETITIONERS,
CROSS-RESPONDENTS

ORDER

[Filed Dec. 17, 1987]

The Director has filed a motion, requesting reconsideration of the Board's April 22, 1987 Order, which dismissed claimant's consolidated appeals, 86-3048A and 86-3049A, in the captioned case. Employer/Carrier have objected to the Director's motion. The Board notes employer/carrier's objections.

Upon careful consideration, the Board hereby denies the Director's motion for reconsideration.

In addition, employer/carrier have filed a supplemental brief in support of their appeals in BRB Nos. 86-3048 and 86-3049. 20 C.F.R. § 802.214. The Board accepts the supplemental brief as part of the record. Responses to the supplemental brief may be filed within twenty (20) days from receipt of this Order. 20 C.F.R. § 802.214.

Finally, the Board acknowledges receipt of claimant's response brief. 20 C.F.R. § 802.211.

/s/ Robert L. Ramsey
ROBERT L. RAMSEY, Chief
Administrative Appeals Judge

/s/ Roy P. Smith
ROY P. SMITH
Administrative Appeals Judge

/s/ James F. Brown
JAMES F. BROWN
Administrative Appeals Judge

/s/ Nancy S. Dolder
NANCY S. DOLDER
Administrative Appeals Judge

/s/ Regina C. McGranery
REGINA C. MCGRANERY
Administrative Appeals Judge

Dated this 17th day of December 1987

APPENDIX B

BENEFITS REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR

BRB No. 86-3048

WALTER SAWYER, CLAIMANT-RESPONDENT

v.

TIDELAND WELDING SERVICE AND
LIBERTY MUTUAL INSURANCE COMPANY,
EMPLOYER/CARRIER-PETITIONER

BRB No. 86-3049

GLYNN RHODES, CLAIMANT-RESPONDENT

v.

TIDELAND WELDING SERVICE AND
LIBERTY MUTUAL INSURANCE COMPANY,
EMPLOYER/CARRIER-PETITIONER

DECISION AND ORDER

[Filed Mar. 31, 1988]

APPEALS OF THE DECISIONS AND ORDERS ON REMAND-AWARDS OF BENEFITS OF BEN H. WALLEY, ADMINISTRATIVE LAW JUDGE, UNITED STATES DEPARTMENT OF LABOR

Before: RAMSEY, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and TAIT, Administrative Appeals Judge.*

PER CURIAM:

Employer appeals the Decisions and Orders on Remand (81-LHCA-2135, 2136) of Administrative Law Judge Ben H. Walley awarding benefits pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended 33 U.S.C. § 901 *et seq.* (the Act). Prior to the initial hearing in this case, the claims were consolidated, as both claims arose from the same incident and involved substantially the same issues. We must affirm the findings of fact and conclusions of law of the administrative law judge which are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. § 921(b)(3); *O'Keeffe v. Smith, Hinchman, & Grylls Associate, Inc.*, 380 U.S. 359 (1965).

On June 21, 1980, claimants sustained injuries in an automobile accident while working for employer as welders. Employer runs a ship and maritime repair fabricating facility located south of highway 90 on both the east and west banks of Bayou Boeuf, Louisiana. Claimants sustained their injuries on the eastern end of the Route 90 Bayou Boeuf overpass, approximately one and one quarter miles from employer's west bank facility and 220 feet from Route 622, the

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* Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. § 921(b)(5) (West 1986).

entrance road to employer's east bank facility. Claimants were on their way home from the west bank facility at the time of their accident.

In his first Decision and Order, the administrative law judge concluded that claimants were not entitled to benefits as they were not injured within the scope of their employment, *see Foster v. Massey*, 407 F.2d 343 (D.C. Cir. 1968), and were not injured on a covered situs. *See* 33 U.S.C. § 903(a). Claimants appealed the findings of the administrative law judge to the Board. In its Decision and Order, the Board reversed the administrative law judge's Decision and Order and found that since claimants received $25 per week from employer specifically for travel expenses, the claimants were injured within the scope and course of their employment pursuant to the "trip payment exception" to the "coming and going rule." *See Sawyer v. Tideland Welding Service*, 16 BRBS 344, 346 (1984). The Board further found that claimants were injured on a covered situs, and the case was remanded to the administrative law judge for consideration of the remaining issues. *Id.*

On remand, the administrative law judge found that claimant Sawyer was entitled to temporary total disability benefits and claimant Rhodes was entitled to temporary total and permanent partial disability benefits as a result of the injuries they sustained in the accident. The administrative law judge awarded both claimants continuing compensation for their respective disabilities, as well as a substantial amount of back benefits totalling approximately $100,000 for Sawyer and approximately $30,000 for Rhodes. On December 3, 1986, employer filed a motion to stay the payments and a notice of appeal of the administrative law judge's decisions with both the Benefits Review Board and the United States Court of Appeals for the

Fifth Circuit. The motion for a stay of payments was subsequently denied by Board Order dated December 8, 1986, for failure to establish irreparable injury. *See* 33 U.S.C. § 921(b). The Fifth Circuit which initially granted a stay, subsequently dissolved it for lack of jurisdiction as an appeal was pending before the Board.[1] *See Tideland Welding Service v. Director, OWCP*, 817 F.2d 1211, 20 BRBS 9 (CRT) (5th Cir. 1987).

On appeal, employer contends that claimants were not injured in the scope or course of their employment and that they were not injured on a covered situs. Employer further contends that it is entitled, under the Constitution, to have an Article III court review the Board's Order prior to paying claimants the compensation awarded by the administrative law judge. In support of this contention, employer argues that Section 21(b)(3) of the Act, 33 U.S.C. § 921(b)(3), requires it to turn over property prior to a review by an Article III court in violation of the due process and equal protection clauses of the Constitution. Finally, employer contends that requiring it to pay a lump sum amount to claimants without a bond or other guarantee of its return if employer is successful on appeal, constitutes irreparable harm to employer. Claimants respond that the administrative law judge's Decision and Order should be affirmed.[2]

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[1] Claimants filed a consolidated cross-appeal (BRB Nos. 86-3048A and 86-3049A) with the Board which was dismissed as untimely by Order dated April 22, 1987.

[2] We decline to address claimants' contentions raised in their response brief that the administrative law judge's erred in denying penalties pursuant to Sections 14(e) and (f), 33 U.S.C. § 914(e), (f), as they were not raised in a timely cross-appeal. *See Del Vacchio v. Sun Shipbuilding & Dry*

When a case is before the Board for a second time, and the same issues are raised in the second appeal, the Board generally holds that its prior decision is the "law of the case," and refuses to re-examine the issue. *See Dixon v. John J. McMullen and Associates Inc.*, 19 BRBS 243 (1987). In the instant case, the Board in its first decision found that claimants were injured in the course of their employment and on a covered situs. These findings constitute the law of the case, and we therefore decline to address employer's contentions concerning these issues which were resolved in the Board's first Decision and Order.

Regarding employer's contention that it has suffered a violation of its constitutional rights, in Section 21(b)(3) of the Act, 33 U.S.C. § 921(b)(3), Congress authorized the Benefits Review Board to hear and determine appeals that raise substantial questions of law and fact from decisions on claims by employees covered under the Act and its extensions. The Board was created to perform the functions formerly performed by the United States District Courts, *see Nacirema Operating Co., Inc. v. Benefits Review Board*, 538 F.2d 73 (3d Cir. 1976), and the United States Courts of Appeal are the only judicial bodies granted direct review authority over final Board decisions. *See* 33 U.S.C. § 921(b)(3), (c). The Board has held that hearing before an administrative law judge provides employer with a full hearing in satisfaction of its right to due process of law, and concluded that requiring an employer to pay benefits while an appeal is pending does not constitute irreparable harm and does not deprive employer of due process. *Smith v.*

Dock Co., 16 BRBS 190 (1984). For the same reason we will not address claimant Rhodes' contention that his average weekly wage was incorrectly calculated.

Aerojet Shipyards, 16 BRBS 49 (1983). Moreover, although it is clear that adjudication of workers' compensation claims under the Act involves "private rights," it is equally clear that Article III of the Constitution does not require Article II judges to perform every stage of adjudication where "private rights" are at stake. *Kalaris v. Donovan*, 697 F.2d 376, 386 (D.C. Cir.), *cert. denied*, 462 U.S. 1119, *reh'g denied*, 463 U.S. 1263 (1983). Employer's contentions are therefore without merit, and are rejected.

Lastly, we decline at this stage to reevaluate case precedent holding that the alleged financial irresponsibility of the benefits recipients alone is sufficient to constitute irreparable harm. *See Associated Indemnity Corp. v. Shea*, 325 F. Supp. 1100 (S.D. Ala. 1971), *aff'd on other grounds*, 455 F.2d 913 (5th Cir. 1972); *Holland America Insurance Co. v. Rogers*, 308 F. Supp. 1031 (N.D. Cal. 1970).

Accordingly, the administrative law judge's Decisions and Orders on Remand-Awards of Benefits are affirmed.

SO ORDERED.

/s/ Robert L. Ramsey

ROBERT L. RAMSEY, Chief
Administrative Appeals Judge

/s/ Roy P. Smith

ROY P. SMITH
Administrative Appeals Judge

/s/ Reid C. Tait

REID C. TAIT
Administrative Appeals Judge

Dated this 31st day of March 1988

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